

## THE RIGHT TO VOTE OF PRISONERS IN MEXICO

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*ABSTRACT. Ever since the promulgation of the Constitution in 1917, the right to vote in Mexico has been understood legally as a privilege for certain citizens, instead of a fundamental right granted to every Mexican national who is at least 18 years old. This situation contravenes the provisions of several international human rights conventions that the country has ratified, to which no reserve in that sense has been submitted. In particular, Mexico is flagrantly violating the electoral rights of persons in prison —convicts—, while failing to comply with its international obligations. A few suggestions are considered within this article, which aims at pointing out ways to improve the situation, as well as some possibilities to legally challenge the provisions which establish the prohibition to vote.*

**KEY WORDS:** *Democracy, disenfranchisement, human rights, suffrage.*

*RESUMEN. Desde la entrada en vigor de la Constitución actual, en 1917, el derecho al voto en México parece ser un privilegio para ciertos ciudadanos, en vez de un derecho fundamental otorgado a todo mexicano mayor de edad. Esta situación es contraria a las disposiciones de diversos tratados internacionales en materia de derechos humanos que México ha ratificado, y ante los cuales no se ha opuesto reserva alguna en ese sentido. Por lo tanto, nuestro país podría estar violando flagrantemente los derechos electorales de las personas que se encuentran en prisión —reos—, así como incumpliendo sus obligaciones internacionales. En el presente artículo se hacen algunas sugerencias, a fin de señalar algunas maneras en que dicha situación podría mejorar, así como posibilidades para contrarrestar las disposiciones que prohíben el voto a través de un proceso constitucional.*

**PALABRAS CLAVE:** *Democracia, suspensión de derechos políticos, derechos humanos, sufragio.*

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## I. INTRODUCTION

In Mexico, any criminal sanction that involves incarceration includes a series of restrictions on the prisoner's other fundamental rights. Needless to say, the most fundamental of those restrictions is that related to the liberty of movement, one of mankind's sacred values. Nevertheless, by sentencing a person to jail for the time established in the judgment also means that another series of rights will be suspended, including the right to citizenship. Of these prerogatives, one of the most important is the right to vote, which is automatically suspended once the criminal indictment is issued.

The aforementioned situation entails a series of negative implications, both for the State and for the individual. For the State, it implies a violation of international human rights, which could also lead to a declaration of international responsibility against Mexico, if an individual claim is filed before any of the organisms responsible for the protection of human rights in the international legal fora. For the individual, the implications are related to discrimination by the rest of the community, social exclusion —well beyond depriving a prisoner of his liberty— that tends to devalue the country's democratic culture and civic education, and exclude him from electing popular representatives, which also has negative effects on the prisoner's later social readjustment. Therefore, in order to avoid a possible violation of international commitments on human rights —and to develop deeper social cohesion and democratic values—, Mexico should reconsider its position on removing prisoners, whether they are convicts or people awaiting trial, of their right to vote,

This article aims to study this situation. In the first section, the framework of the Mexican Constitution is analyzed, as are the principal international human rights instruments that Mexico has ratified: the Universal Declaration

of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights, or the Pact of San Jose. In addition to this legal context, the main doctrinal theories in favor and against felon disenfranchisement will be discussed.

The second section reviews recent developments in Mexican constitutional and electoral practices, from the standpoint of the principal judicial institutions in charge of ruling on these legal situations. In addition, some of the existing doctrine on this matter resulting from decisions issued by both the Mexican Supreme Court of Justice and the Electoral Tribunal will be discussed.

The third section argues that the common practice of restricting the right to vote is discriminatory and poses a threat to equality. It explores the legal panorama in other democratic regimes like those of countries the United States of America, Canada and France. There is also a brief analysis of the main jurisprudence on the subject as established by the European Court of Human Rights in the cases of *Hirst v. United Kingdom* and *Frodl v. Austria*.

In the last section, the discussion focuses on the need to adapt Mexican democratic culture to current international standards, in order to avoid continuing with the flagrant violation of citizens' political rights. Here the article emphasizes the requirement of compliance with the international instruments that have been ratified by the country, in an effort to achieve a further and more developed human rights protection and guarantees in Mexico.

## II. THE RIGHT TO VOTE IN MEXICO AND INTERNATIONAL CONVENTIONS ON HUMAN RIGHTS

The Political Constitution of the United Mexican States identifies the main political rights of Mexican citizens in several articles. The constitutional prerogative of citizens to vote and be elected, that is, to exercise active and passive voting rights, is stated in the first and second section of Article 35 of the Constitution. Also, the third section establishes citizens' obligation to vote in the popular elections held on national territory to determine its political leadership and popular representatives.

As it is, the Mexican Constitution enumerates democracy's most representative political rights, in other words, their *sine qua non* characteristics:<sup>1</sup> temporary and effective rotations of popular representatives, who for the most part obtain offices through general elections (passive vote) in which electors emit their votes (active vote).

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<sup>1</sup> See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15-6 (2006) ("For one thing, it should be possible to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves... For another, the people themselves should participate in government... Finally, the people, and their representatives, must have the capacity to exercise their democratic responsibilities").

In this sense, the Mexican Constitution includes two of the historically most representative political rights, which have been fought for since the French Revolution and later transcribed into the Universal Declaration of Human Rights of the United Nations, as well as in regional human rights instruments (the American Convention on Human Rights and the Treaty of Rome of 1950), and the International Covenant on Civil and Political Rights.<sup>2</sup>

For that matter, the principal human rights instruments have established the rights to vote actively and passively as part of any person's fundamental rights. For example, in Article 21, the Universal Declaration of Human Rights lists the right of all human beings to participate in the government of their countries, to have access to public office and basically, to democracy *stricto sensu*; that is, that their political will be demonstrated through effective and secret suffrage.

Likewise, the American Convention on Human Rights of 1969, also known as the *Pact of San Jose*, identifies those rights as human rights, codifying them in Article 23, while pointing out that any restrictions may be solely based on age, nationality, language, education or the absence of a criminal sentence. Keeping the aforementioned in mind, international law has granted political rights the character of *human rights*, and they are also included in the Mexican Constitution.<sup>3</sup>

However, the Political Constitution of the United Mexican States has also established a restriction on electoral matters and political rights in Article 38—which is also included in the Pact of San Jose—regarding the possibility of restricting a citizen from voting or being elected when a criminal conviction or procedure has been filed against him. Said constitutional law establishes the causes for the suspension of citizens' political rights, among which the most important are sections II and III, which state that the suspension of rights will take place whenever an individual is subjected to a procedure for a crime punishable by imprisonment, as of the date on which the formal writ of imprisonment is issued, as well as while serving a prison sentence.

Notwithstanding the provisions in the Mexican Constitution and despite the normative restriction imposed by the American Convention on Human

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<sup>2</sup> Manuel Becerra Ramírez, *Los derechos humanos y el voto en el extranjero*, in HÉCTOR FIX-ZAMUDIO, MÉXICO Y LAS DECLARACIONES DE DERECHOS HUMANOS 181 (1999) (“Accordingly, ...political rights or the rights to political participation have an evolution that started in the political thoughts of the 17<sup>th</sup> and 18<sup>th</sup> centuries, with the three classic authors: Locke, Montesquieu and Rousseau, and which were granted full force in the 1789 French Declaration of the Rights of Man and of the Citizen and the U.S. Constitution, both of known as the driving forces behind the Universal Declaration of 1948”).

<sup>3</sup> See Felipe Tredinnick Abasto, *Derecho internacional de los derechos humanos: su aplicación directa*, in KONRAD ADENAUER STIFTUNG, ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 350 (2002) (“The development of human rights obviously begins with the protection established in national Constitutions, incomplete and different in both their contents and forms. [Therefore,] they approach International Human Rights Law as a coinciding and convergent effort, to become non-negotiable, irrevocable norms anywhere in the world”).

Rights, the 1948 Universal Declaration of Human Rights (UDHR) is still considered the interpretative standard for all international human rights instruments—a source of *jus cogens*, obligatory and irrevocable norms that apply equally to the entire international community, and derive from international custom. From the same standpoint as the UDHR, the 1966 International Covenant on Civil and Political Rights has determined in paragraph b of Article 25 that all persons shall have the right to vote and be elected, without unreasonable restrictions.<sup>4</sup> Therefore, it is important to point out the characteristics and intentions of said international instruments to determine which shall prevail and have direct applicability in the Mexican legal panorama, leaving the State without any excuse for it not to comply with international laws due to substantial differences in its national regulations.<sup>5</sup>

One of the fundamental pillars of the Mexican Constitution is found in Article 133, which regulates the interaction between the national and international laws to be applied or have legal effects on a national level. This constitutional article establishes a hierarchy, in which the Constitution is the primary law to which all other legal instruments, be they laws or international treaties, shall be subjected to. This hierarchy, however, has been challenged and even surpassed by a recent constitutional reform that entered into force on June 10, 2011, which clearly states that the human rights contained in international treaties ratified by the Senate will have the same legal standing as the Constitution itself. It is also true that Mexico has the direct and inescapable obligation of complying with the *pacta sunt servanda* principle expressed in each of the international treaties it is a Party to, including the international human rights instruments that the country has willfully ratified.<sup>6</sup>

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<sup>4</sup> In its *travaux préparatoires*, the ICCPR committee discussed as restrictions the problems of age and mental health and impairment, but did not address the situation of convicts, contrary to other international human rights instruments, as the Pact of San Jose. UN Document A/2929, July 1, 1955 (“While it was considered necessary to prohibit restrictions which amounted to discrimination, it was observed that in most countries the right to vote was denied to certain categories of persons, such as minors and lunatics, and that the right to be elected to public office and the right of access to public service were generally subjected to certain qualifications”).

<sup>5</sup> See Germán Bidart Campos, *El derecho internacional de los derechos humanos*, in 20 JURÍDICA, ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 104, 105 (1990) (“[I]nternational and national laws of each State share the problem of rights and their effective solution”). It is important to indicate that in accordance with the general principle of international law, there is an impossibility for the State to excuse itself from complying with a norm of international law by alleging contradiction to national law. Therefore, Mexico risks being accused of violating one fundamental principle of international human rights law and disregarding its international responsibility, and what is worse, the jurisprudence and current international practice on this matter.

<sup>6</sup> See Mara Gómez-Pérez, *La protección internacional de los derechos humanos y la soberanía nacional*, in KONRAD ADENAUER STIFTUNG, *supra* note 3, at 371 (“[D]espite the provisions of the internal laws of a State, and notwithstanding any resolution or decision by national authorities, inter-

Due to the above, the problem of defining the legitimacy of restricting the right to vote to people in prison arises.<sup>7</sup> This situation, a current and in-depth debate in international academia on suffrage and political participation, is a deep-rooted problem in several democracies. The first difficulty that stands out is the legitimacy of disenfranchisement itself, based on its principal intention. What is the goal of disenfranchising convicts, or people who have their political rights suspended even before being sentenced.

Political doctrine has identified several theories that back the argument for disenfranchising prisoners. Some of these theories expound reasons such as: maintaining the purity of the ballot box,<sup>8</sup> avoiding the possibility of subversive voting,<sup>9</sup> punishing the breach and expulsion from the social contract<sup>10</sup> or

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national treaties —and even more so those related to the protection of human rights— have a higher hierarchy than the Constitution of the States Party to it”).

<sup>7</sup> It must be nonetheless noted that as soon as a convict has finished purging his sentence, he will automatically recover his political rights —the only exception being that the sentence itself was on his political rights, and not as a collateral sanction. Therefore, the discussion on this article is focused on people who are in prison, whether convicts or awaiting trial, and not ex-convicts.

<sup>8</sup> This theory supports the argument that the government must be composed of and elected by good citizens who are committed to their society, and therefore, including convicts and ex-convicts would be an impediment to maintaining immaculate electoral participation. See Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and the Purity of the Ballot Box*, 101 HARV. L. REV. 1313 (1989) (“The image suggests not only that former offenders are impure, but also that their impurity may be contagious. It reflects a belief that clear boundaries must be maintained between the tainted criminal and the virtuous citizenry, lest contamination occur”); see also Editorial, *Purity of the Ballot-Box*, N. Y. TIMES, March 26, 1870, available at <http://query.nytimes.com/gst/abstract.html?res=F50710FE385F137B93CAAB1788D85F448784F9> (“The theory of the purity of the ballot box aims to secure an honest expression of the popular will”).

<sup>9</sup> See generally Alec C. Ewald, *An “Agenda for Demolition”: The Fallacy and the Danger of the “Subversive Voting” Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 116-19 (2004) (“The argument consists of two elements. First, the right to political participation should be conditioned on some kind of behavior or contribution. Second, allowing people lacking the requisite qualities to participate threatens the social order”). According to Ewald, the subversive-voting hypothesis dictates that convicts will use the right to vote for a criminal activity or to cancel other votes out, or even to support a candidate who holds a relaxed stance on criminality. He also mentions that “when felons demand the right to vote, they demand the right to govern others while rejecting the right of others to govern them.”

<sup>10</sup> Following Rousseau’s classic doctrine, this theory states that whenever an individual breaches a rule of society he is a part of, he exits that society, and therefore the existing social contract. Once the individual purges his sentence, he is reinstated into society, entering a new social contract, different than the one he left behind —which has also led some countries (and notably the United States) to impose new conditions on ex-convicts upon re-entry, such as a longer and even life disenfranchisement. See generally Angela Behrens, *Voting - Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 242 (2004) (“[T]hose who breach that [social] contract rescind their right to participate in the political sphere of society”); Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 113 (2003) (“Incarceration removes

the lack of civil virtue,<sup>11</sup> among others. These theories look toward maintaining a society in which criminals who are “paying their debt” are denied the political right to participate in free and universal elections, reducing their social status to that of objects, rather than subjects, because they are not allowed to participate in the election of the representatives of their society.

On the other hand, there is also an even stronger argument supporting enfranchisement, according to which allowing a convict to vote implies the convict’s inclusion in society, facilitating his reintegration into the community and playing an important role in the development of a democracy while arguing that maintaining the disenfranchisement is an excessive punishment that has no other end than penalizing the criminal, without proven effects of deterrence or rehabilitation.<sup>12</sup> It is also important to recognize the growing legal trend around the world that supports this doctrine —there is indeed transnational judicial discourse<sup>13</sup> in favor of prisoner enfranchisement. This discussion is not exclusive to U.S. political and legal doctrines, but has been undertaken by Mexican tribunals and scholars, who have argued both in favor and against disenfranchisement with different results. The constitutional results of this argument will be discussed in the next chapter.

Taking only legal framework into consideration, it is evident that the Mexican Constitution, as well as the rest of its laws on electoral matters, may be flagrantly violating imprisoned people’s right to vote, using the —illegal— suspension of electoral rights which is directly contrary to the provisions established by the previously mentioned international human rights instruments as an argument.

Furthermore, legal doctrine by some Mexican jurists has leaned toward recognizing the right to vote as both a human and fundamental right, since it is established within the framework of the Constitution: “...in Mexico, giving

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the felon from society, and in this state, the felon does not have the capacity to be a party of the social contract”).

<sup>11</sup> A republican version of this doctrine indicates that any individual that is not civically virtuous enough should be barred from participating in society’s rules and government. However, as Reiman argues, the improvement of civic virtue through the enfranchisement of convicts would most probably have a rehabilitative or educational effect, rather than a negative one. I find this theory to be very close to the theory of the purity of the ballot-box, and therefore, not convincing enough for excluding convicts from voting. See J. Reiman, *Liberal and Republican Arguments against the Disenfranchisement of Felons*, 24 CRIMINAL JUSTICE ETHICS 3, 16 (2005).

<sup>12</sup> See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1166 (2004) (“[D]isenfranchisement really can be justified only under a retributive theory of criminal punishment. Neither rehabilitation nor deterrence plays any plausible role at all in justifying the disenfranchisement of... offenders”). From this standpoint, Karlan even asks herself if disenfranchisement can be considered to be consistent with the prohibition on cruel and unusual punishment established in several international human rights treaties, a doubt —and possibility— that we share.

<sup>13</sup> See Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B. U. INT’L L.J. 196, 221 (2011).

suffrage the character of a fundamental right would also have the effect that its force as a human right would be backed up by the State's system of constitutional justice."<sup>14</sup> If the right to effective suffrage is considered a fundamental right —because it is included in the Constitution— and as a human right itself, it would obligate the State to comply with the international regulations on the subject.

### III. THE RIGHT TO VOTE ACCORDING TO MEXICAN COURTS: A CHANGING PATTERN?

The suspension of political rights as a result of incarcerating or being subject to criminal proceedings has been the model followed in the Mexican legal system for a long time, and was an established doctrinal concept that could not be successfully challenged in court. It was not until the end of the 20<sup>th</sup> century that some cases were brought before the different judicial institutions, namely the Supreme Court of Justice (Suprema Corte de Justicia de la Nación, hereinafter SCJN) and the Electoral Tribunal of Federal Judiciary (Tribunal Electoral del Poder Judicial de la Federación, hereinafter TEPJF). However, an even clearer change in the interpretation and meaning of the right to vote as a fundamental right has recently emerged in the judicial practices of both judicial organisms.

Before considering the specific case law in which the suspension of political rights has been addressed, we must look deeper into the constitutional bases for this suspension. As stated above, according to Article 38 of the Constitution, the right to vote can be suspended for several reasons: for being subjected to criminal proceedings for a crime punishable by incarceration, from the moment the writ of indictment is issued (§-II); while serving a criminal sentence (§-III); for being a fugitive, as of when the detention order is issued and until the statute of limitations expires (§-V), and for a criminal sentence explicitly imposing the suspension as an autonomous penalty (§-VI).

Basically, the suspension of political rights —and specifically of the right to vote— we are discussing is the one contained in sections II and III: When a person is in prison while the criminal process is underway (following the writ of indictment), and is serving a criminal sentence. This political punishment, unless it is the specific sanction to be applied to a person (as it would in the case of section VI of article 38), is a *collateral sanction*. In the words of Demleitner, "Any conviction may trigger [some] collateral sanctions. These are sanctions that befall a criminal offender, either automatically or through an administrative process, after the conviction and independent of the sentence."<sup>15</sup>

<sup>14</sup> Carlos Emilio Arenas Bátiz, *El voto como derecho fundamental de base constitucional y configuración legal. Concepto y consecuencias*, in HUGO ALEJANDRO CONCHA CANTÚ, SISTEMA REPRESENTATIVO Y DEMOCRACIA SEMIDIRECTA. MEMORIA DEL VII CONGRESO IBEROAMERICANO DE DERECHO CONSTITUCIONAL 68 (2002).

<sup>15</sup> Nora V. Demleitner, *Thwarting a New Start? Foreign Convictions, Sentencing and Collateral Sanc-*



This position has been zealously upheld by the SCJN, but recently challenged by a more dynamic, progressive and humanistic TEPJF, which has taken a different approach to the suspension of political rights as a Constitutional Court on electoral matters.

In the first place, the status of “being subject to criminal proceedings” is not reason enough for the suspension of political rights. Even before the entry into force of the aforementioned human rights reform, SCJN jurisprudence had already stated the implicit existence of the presumption of innocence in the Mexican Constitution, thus giving it the standing of a fundamental procedural right. The cited reform only enhanced its status since that provision is contained in several of the human rights treaties to which the country is a Party, and which Mexico must respect. Therefore, the non-existence of a criminal sentence imposing a penalty on anyone who is in prison while awaiting trial would automatically imply the presumption of innocence, making him ineligible to have his political rights suspended.

However, due to the fact that this reform has just entered into force, we must consider the case law made before the constitutional amendments were passed. One case of constitutional review was based on the existence of contradictory provisions and was brought before the SCJN, which had to determine which jurisprudence should prevail. In Case 29/2007-PS of the First Chamber, the Court debated whether the suspension of political rights should take effect as of the moment the writ of indictment is issued (pursuant to Article 38 of the Constitution), or until a final conviction has been pronounced (which, according to Article 46 of the Federal Criminal Code or FCC, would be the more appropriate moment). This second approach had been used by the 10<sup>th</sup> Collegiate Criminal Tribunal of the First Circuit in *Amparo* 1020/2005, which argued that since Article 46 of the FCC had a more constructive approach than that of Article 38 of the Constitution (*favor libertatis*),<sup>16</sup> and taking into account the presumption of innocence, the suspension of the accused’s political rights should be lifted. This position had been held by the Tribunal in several other cases, since the Constitution only

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tions, 36 TOL. LAW REV. 505, 514-15 (2005); see also Luis Efrén Ríos Vega, *El derecho al sufragio del presunto delincuente. El caso Facundo*, 6 JUSTICIA ELECTORAL 293, 296 (2010). (Discussing what he considers a better option to the suspension of political rights) (“[I]t is not, in my opinion, the presumption of innocence understood as a non-suspension of political rights due to the lack of a final judgment as a directing criterion, but mostly based on the principles of “strict legality” and “proportionality” of penalties that force any authority to strictly, proportionally and individually justify the privation of each political right as a provisory measure to a criminal cause, whenever there is a presumption of a future damage or clear risk...”).

<sup>16</sup> A principle stating that whenever there is a doubt regarding the interpretation of a restrictive norm, the approach that best serves the interest of liberty of the accused should be used. It has a close relation to other legal principles, such as *pro homine*. For a further analysis of this principle, see Antônio Augusto Cançado Trindade, *Direito internacional e direito interno: Sua interação na proteção dos direitos humanos*, June 12, 1996, <http://www.pge.sp.gov.br/centrodeestudos/bibliotecavirtual/instrumentos/introd.htm>.

enumerates minimum guarantees, which can therefore be extended by other legal instruments, even those of lower hierarchy.<sup>17</sup>

The opposite argument had been posed by the First Collegiate Tribunal for Criminal and Administrative Matters of the Fifth Circuit, which said that Article 38 of the Constitution should be held as the obligatory norm, due to its hierarchical position in relation to Article 46 of the FCC, despite its more constructive approach. On reviewing the arguments of both courts, the First Chamber of the SCJN determined that Article 38 of the Constitution and Article 46 of the FCC referred to different procedural moments. Therefore, the SCJN determined that there was no contradiction since Article 46 referred to section III of Article 38 (when a final conviction had been reached) and the 10<sup>th</sup> Collegiate Tribunal had misinterpreted the procedural application of the rights set forth in the FCC.<sup>18</sup> What is remarkable, however, is one of the analyses made by the First Chamber, which stated that having a decent way of life, in respecting the law, enhanced legitimacy and the rule of law.<sup>19</sup> Therefore, the SCJN upheld its traditional view of the convict's disenfranchisement, which can be found in the argument put forth by Sigler: “[W]hen felons choose to violate societal laws, they break the social contract that guarantees their fundamental rights and freedoms.”<sup>20</sup>

<sup>17</sup> MANUEL BECERRA RAMÍREZ, *LA RECEPCIÓN DEL DERECHO INTERNACIONAL EN EL DERECHO INTERNO* 60 (2006).

<sup>18</sup> “Therefore, Article 46 of the FCC does not intend to explicitly nor implicitly regulate the effects of the writ of indictment, but only the effects of the conviction regarding the suspension of rights.” Ricardo García Manrique, *La suspensión de los derechos políticos por causa penal: El caso mexicano*, Address at the II Seminario Internacional del Observatorio Judicial Electoral (Nov. 19, 2009) [http://www.trife.gob.mx/eventos/micrositio/ricardo\\_garcia\\_manrique.pdf](http://www.trife.gob.mx/eventos/micrositio/ricardo_garcia_manrique.pdf). This same approach was taken by the SCJN. In ruling on the procedure of constitutional review 33/2009 —Coahuila, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XXX, Septiembre de 2009, *Acción de inconstitucionalidad 33/2009*, Página 1955 y siguientes (Mex.)—, by comparing the decision reached in Case 29/2007-PS. *DERECHOS POLÍTICOS. DEBEN DECLARARSE SUSPENDIDOS DESDE EL DICTADO DEL AUTO DE FORMAL PRISIÓN, EN TÉRMINOS DEL ARTÍCULO 38, FRACCIÓN II, DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS*, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XXVII, Febrero de 2008, Tesis 1a./J. 171/2007, página 215 (Mex.)— (on the different time frames to which Articles 38 of the Constitution and 46 of the FCC refer and apply), it declared the inexistence of situation of unconstitutionality between the norms of the Electoral Code of the State of Coahuila and the Federal Constitution.

<sup>19</sup> See BREYER, *supra* note 1, at 15 (“The concept of active liberty refers to a sharing of a nation’s sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests several kinds of connection between that legitimacy and the people”).

<sup>20</sup> JAY A. SIGLER, *CIVIL RIGHTS IN AMERICA: 1500 TO THE PRESENT* 383-84 (1998). See also Virginia Pujadas Tortosa, *Cuestiones relativas a la naturaleza jurídica de la suspensión de derechos electorales por causa penal y su relación con la presunción de inocencia*, Address at the III Seminario Internacional del Obser-

2007 also marked an important year for the TEPJF in terms of the judicial debate over the suspension of political rights. Three hallmark cases were discussed: *Hernández Caballero*<sup>21</sup> (SUP-JDC-20/2007), *Pedraza Longi*<sup>22</sup> (SUP-JDC-85/2007) and *García Zalvidea*<sup>23</sup> (SUP-JDC-2045/2007). These cases were brought under the framework of the Juicio para la Protección de los Derechos Político-Electorales del Ciudadano [Trial for the Protection of Political-Electoral Rights of the Citizen], which was created as a solution to a political-electoral problem that arose in filing a human rights violation case, the *Castañeda Gutman* case, before the Inter-American Court of Human Rights, and served as a legal instrument designed to judicially review the situation of the plaintiffs' political rights.

In the *Hernández Caballero* case, the plaintiff argued that the Federal Electoral Institute (IFE) refused to issue him a voter's registration card because the plaintiff's political rights had been suspended. Omar Hernández Caballero had been convicted of an intentional crime, but due to good behavior, he was released on parole before his sentence had been completed. On receiving a negative response from the IFE, he brought the case before the TEPJF. The Electoral Tribunal ruled that since the plaintiff had his physical liberty restored, his other rights should no longer be suspended, basing its decision on foreign case law to be discussed in the next chapter. In other words, his freedom restored *ipso facto* his political rights, and since he was already reintegrated into society, the Tribunal found no reason to withhold his political freedom.<sup>24</sup>

The second case, *Pedraza Longi*, was based on somewhat similar circumstances, but had a more profound impact than *Hernández Caballero*. The IFE once again refused to grant a voter's registration card to the plaintiff, on the grounds that he had had his political rights suspended due to a writ of indictment issued against him. However, due to the fact that it was a minor crime,

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*vatorio Judicial Electoral* (Oct. 7, 2010), [http://www.trife.gob.mx/ccje/IIIobservatorio/archivos/ponencia\\_virginia.pdf](http://www.trife.gob.mx/ccje/IIIobservatorio/archivos/ponencia_virginia.pdf) (“[T]he suspension of political rights effectively constitutes a ‘guarantee to the legal security of the rest of the citizens’... [since] the objective of said suspension is contributing to maintain the legitimacy and the rule of law”). Behrens, *supra* note 10, at 241.

<sup>21</sup> Omar Hernández Caballero, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], *Gaceta Jurisprudencia y Tesis en Materia Electoral*, Año 1, Número 1 (2008), Febrero de 2007, SUP-JDC-20/2007, Página 93 (Mex.).

<sup>22</sup> José Gregorio Pedraza Longi, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], *Gaceta Jurisprudencia y Tesis en Materia Electoral*, Año 1, Número 1 (2008), Junio de 2007, SUP-JDC-85/2007, Página 96 (Mex.).

<sup>23</sup> Juan Ignacio García Zalvidea, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Noviembre de 2007, SUP-JDC-2045/2007 (Mex.).

<sup>24</sup> See LUIS EFRÉN RÍOS VEGA, *EL DERECHO A LA REHABILITACIÓN DE LOS DERECHOS POLÍTICOS: EL CASO HERNÁNDEZ* 44 (2010) (“The basis for the political suspension is the criminal conduct that harms the legal goods protected by political rights, while the basis for rehabilitation is the guarantee of social reinsertion...”).

he was granted bail. In strict adherence to section II of Article 38 of the Constitution, the court determined that since the crime Pedraza Longi was accused of was punishable by incarceration, but entitled to bail, it could be implied that it was not necessary to suspend his political rights, moreover if he was not either legally or materially impaired<sup>25</sup> to exercise his right to vote. Therefore, the TEPJF determined the possibility that in cases in which the accused could be granted bail and awaited trial in freedom, the suspension of political rights would not be automatic.<sup>26</sup> This same criterion was later used in Case ST-JDC-22/2009<sup>27</sup> (also known as the *Facundo* case), in which the same authority equally resolved that citizenship cannot be suspended if a presumed criminal faces his trial in freedom.

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<sup>25</sup> According to Pujadas Tortosa, the two causes for suspending the exercise of political rights are the retribution for the crime committed, and the material and legal impairment to exercise that right. Pujadas Tortosa, *supra* note 20. Both causes were upheld by the SCJN in its ruling on the Case 29/2007-PS, which ruled that the suspension of political rights must take place from the moment the writ of indictment is issued. In *Pedraza Longi*, we can observe the divergence in the criteria applied by the SCJN and the TEPJF, a difference that lasted until the SCJN resolved Case Coahuila (6/2008) in May 2011. Case 29/2007-PS-DERECHOS POLÍTICOS. DEBEN DECLARARSE SUSPENDIDOS DESDE EL DICTADO DEL AUTO DE FORMAL PRISIÓN, EN TÉRMINOS DEL ARTÍCULO 38, FRACCIÓN II, DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVII, Febrero de 2008, Tesis 1a./J. 171/2007, página 215 (Mex.); José Gregorio Pedraza Longi, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Gaceta Jurisprudencia y Tesis en Materia Electoral, Año 1, Número 1 (2008), Junio de 2007, SUP-JDC-85/2007, Página 96 (Mex.); Case 6/2008-PL-DERECHO AL VOTO. SE SUSPENDE POR EL DICTADO DEL AUTO DE FORMAL PRISIÓN O DE VINCULACIÓN A PROCESO, SÓLO CUANDO EL PROCESADO ESTÉ EFECTIVAMENTE PRIVADO DE SU LIBERTAD, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIV, Septiembre de 2011, Tesis P./J. 33/2011, página 6 (Mex.).

<sup>26</sup> This precedent and logic was later used by the SCJN in another case of contradictory jurisprudence (6/2008-PL), which was resolved three years after it was filed, in May 2011. In this case, the SCJN updated its criteria on the matter, stating that based on the fact that both the presumption of innocence and the right to vote are fundamental rights, any person who, while being legally bound to criminal proceedings, faces it in freedom on being granted bail, will be able to vote. Case 6/2008-PL-DERECHO AL VOTO. SE SUSPENDE POR EL DICTADO DEL AUTO DE FORMAL PRISIÓN O DE VINCULACIÓN A PROCESO, SÓLO CUANDO EL PROCESADO ESTÉ EFECTIVAMENTE PRIVADO DE SU LIBERTAD, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIV, Septiembre de 2011, Tesis P./J. 33/2011, página 6 (Mex.). See also García, *supra* note 18, at 9. (“[W]e would need to determine why being bound to criminal proceedings requires that ‘collateral consequence,’ for we must not forget that any precautionary measure will only make sense if it effectively contributes to the success of the ongoing proceedings, or if it is certain to avoid the predictable commission of new crimes”).

<sup>27</sup> Cirilo Facundo Hernández, Sala Regional Toluca del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Marzo de 2009, ST-JDC-22/2009 (Mex.).

The *García Zalvidea* case had the same premise as that of *Pedraza Longi*. The plaintiff, Juan Ignacio García Zalvidea, argued that the IFE did not issue him a voter's registration card, due to a "judicial situation." The TEPJF used the jurisprudence set forth in *Pedraza Longi* and ruled that since the plaintiff faced his criminal trial in liberty, his political rights could not be undermined, since doing so would contravene the international obligations of the State under Articles 25 of the International Covenant on Civil and Political Rights and 23.2 of the American Convention on Human Rights, as well as General Comment No. 25 of the UN's Human Rights Committee, which states that the application of the presumption of innocence guarantees the right to vote until a final conviction has been pronounced and executed. The Electoral Tribunal also cited the *in dubio pro cive* principle, which states that whenever there is a doubt in the application of a norm, the interpretation should be used in favor of the citizen.<sup>28</sup> The Tribunal also argued that the criminal policy on social reintegration directly implies the protection of human rights to its greatest extent, and due to the presumption of innocence, the right to exercise one's active vote should be preserved until a conviction is pronounced.<sup>29</sup>

Three similar cases were brought before the TEPJF in 2009 and 2010, but these cases dealt with other part of the sphere of political rights: the right to be elected. For the purposes of this article, however, we will focus on only two: Case SUP-JDC-98/2010<sup>30</sup> (also known as *Orozco*) and Case SUP-JDC-157/2010<sup>31</sup> (referred to as *Greg*). In the *Orozco* case, Martín Orozco Sandoval was competing as a pre-candidate for the governorship of the State of Aguascalientes. When trying to register as a candidate, the IFE denied him the right to contend, arguing that an order of detention and a writ of indictment had been filed against him, and therefore, his political rights had been suspended. Once more, the TEPJF used *Pedraza Longi* jurisprudence to grant the plaintiff the right to register as a candidate for the election since he had obtained an

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<sup>28</sup> This resolution by the TEPJF High Chamber was in accordance with international standards set forth in human rights instruments, and now complies with the provisions provided in Article 1 of the Constitution, which entered into force with the human rights constitutional amendment. See María del Pilar Hernández, *Análisis y perspectivas de los derechos político-electorales del ciudadano*, in DIEGO VALADÉS & MIGUEL CARBONELL, *EL PROCESO CONSTITUYENTE MEXICANO. A 150 AÑOS DE LA CONSTITUCIÓN DE 1857 Y 90 DE LA CONSTITUCIÓN DE 1917*, 553 (2007).

<sup>29</sup> Mónica Pinto, *El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos*, in MARTÍN ABREGÚ & CHRISTIAN COURTIS, *LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES* 163 (1997) ("[A]n interpretative criterion that exists in human rights law, according to which the widest norm or the most extensive interpretation shall be used whenever protected rights should be recognized... This principle coincides with the fundamental element of human rights law, that it shall always favor order").

<sup>30</sup> Martín Orozco Sandoval, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Mayo de 2010, SUP-JDC-98/2010 (Mex.).

<sup>31</sup> Gregorio Sánchez Martínez y Coalición "Mega Alianza Todos Por Quintana Roo", Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Junio de 2010, SUP-JDC-157/2010 (Mex.).

*amparo* that protected his freedom from the writ of indictment. However, the Electoral Tribunal explicitly stated that should the candidate's legal status change before taking the oath of office in the event of winning the election, his rights could be rightfully removed, and his right to take office could be waived. This decision was supported by the precedent of *Godoy Toscano*,<sup>32</sup> in which a writ of indictment had been issued against an elected federal representative, preventing him from assuming his duties because he was a fugitive. The TEPJF reinforced both instances of jurisprudence in the *Orozco* case, basically reaffirming the interpretation that whenever a person faced a criminal procedure in freedom, he could exercise his political rights.

The *Greg* case, however, was more controversial. A candidate for the election of Governor of the State of Quintana Roo, Gregorio Sánchez Martínez, was registered before the IFE. However, a month before the elections, a writ of indictment was issued against him and executed for charges of organized crime and other serious offenses, to which no bail could be granted. The candidate was then removed from the ballot. In this case, the literal interpretation of Article 38 of the Constitution was used, for the candidate could not exercise his electoral rights because these rights were both legally and materially impaired. Therefore, the case did not fall within the exceptions that had been jurisprudentially established by the Tribunal, and although the presumption of innocence was still considered, the candidate, if elected, would not be able to take office or otherwise serve as governor.

Following this description of the case law ruled upon by both the Supreme Court of Justice and the Electoral Tribunal, it can be said that the SCJN interpretation tends to be more traditional and sometimes outdated, while the decisions of the TEPJF are generally more directed at human-rights and transnational-discourse. However, both organisms —the former more than the latter— show a tendency to resolve its cases with a somewhat incomplete analysis and resulting decision. Both institutions have somewhat displayed profound reservations for reinstating or granting political rights in controversial cases, maintaining a distant approach to more liberal resolutions.<sup>33</sup> Both courts oscillate between several of the above theories, such as *civic virtue* or *breach of the social contract*,<sup>34</sup> while slowly advancing their interpretation and

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<sup>32</sup> Julio César Godoy Toscano, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Octubre de 2009, SUP-JDC-670/2009 (Mex.).

<sup>33</sup> Marco Olivetti, *Presunción de inocencia, limitaciones a la libertad personal y limitaciones al sufragio activo y pasivo*, Address at the *III Seminario Internacional del Observatorio Judicial Electoral* (Oct. 7, 2010) [http://www.wvtrife.gob.mx/ccje/IIIobservatorio/archivos/ponencia\\_marco.pdf](http://www.wvtrife.gob.mx/ccje/IIIobservatorio/archivos/ponencia_marco.pdf) (“[The suspension of political rights has as]... its end the protection of society from the distortive effect that could be produced with the participation of criminals in the conformation of the will of the organs of the State...”).

<sup>34</sup> RÍOS VEGA, *supra* note 24, at 47 (“[T]he law offenders renounce, by violating it, to the general protection: the equal treatment in relation to other citizens”).

jurisprudence in less controversial cases. What is even less impressive is their continued use of the “hierarchy excuse” to persist in avoiding international responsibilities while denying citizens and convicts an updated, inclusive and internationally-oriented legal framework.<sup>35</sup>

However, the increasing use of dissenting opinions by both institutions can be seen as an important step toward setting new standards that could and probably will be later adopted as a general interpretation. In this sense, Judge González Oropeza’s dissenting opinion in the *Greg* case deserves mention. Citing several foreign sources, such as those of the *Micro* resolution in South Africa or the *Sauvé* case in Canada, the judge essentially ascertains and recognizes the importance of all international human rights treaties while declaring their preferential applicability when opposed to domestic law. Therefore, Judge González Oropeza states that section II of Article 38 of the Mexican Constitution is surpassed by section VI, declaring that the suspension of political rights of people who are in prison, whether already sentenced or facing criminal proceedings, is unconstitutional and contrary to international law since this measure goes against the main objective of convictions: the individual’s social rehabilitation respecting his internationally and constitutionally recognized human rights (basically, the principles of *favor libertatis* and *pro homine*), as expressed in the human rights reform to Article 18 of the Constitution. The suspension of political rights undermines the effects of the presumption of innocence, and runs contrary to the principle of free and universal suffrage.<sup>36</sup>

It is our opinion that, while it is undeniable that both the Electoral Tribunal and the Supreme Court of Justice are slowly updating their interpretations techniques and opening up to internationally recognized standards and practices, it is necessary to continue along this path, in order to benefit our democratic society and values to the greatest possible extent. Judge González Oro-

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<sup>35</sup> A. Behrens, *supra* note 10 at 275 (“If the right to vote is fundamental, then felon disenfranchisement is impermissible and only courts can fully eliminate this practice”). There is a growing international movement towards minimizing *ius puniendi*, which is focused on excluding collateral sanctions from the main penalty. See NIEVES SANZ MULAS, *ALTERNATIVAS A LA PRISIÓN* 238 (2004).

<sup>36</sup> Gregorio Sánchez Martínez y Coalición “Mega Alianza Todos Por Quintana Roo”, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Junio de 2010, SUP-JDC-157/2010. Voto particular del Magistrado Manuel González Oropeza, Páginas 27-30 (Mex.). Doctrine supports the concepts mentioned by Judge González Oropeza: “...disenfranchising offenders is a ‘form of punishment,’ without any evidence that the sanction has retributive, deterrent or rehabilitative power; and that because offenders violate the ‘social contract,’ they forfeit political rights completely unrelated to the needs of incarceration.” See also Ewald, *supra* note 9, at 110-11 (“[Criminal disenfranchisement statutes]... must serve some legitimate purpose, and they cannot rest on an impermissible one”); Karlan, *supra* note 12, at 1155 (“Only collateral sanctions that are based on a risk assessment can be continued... Any sanction that is not risk-based or is too broad as currently enforced, should be abolished”); Demleitner, *supra* note 15.

peza's dissenting opinion in the *Greg* case, as well as some considerations the TEPJF has contributed to international doctrine and transnational judicial discourse, are extraordinary exercises in protecting fundamental rights to their maximum extent. It would be desirable, however, for these judicial contributions and considerations to be less extraordinary and much more common, and not only in the Constitutional Court for Electoral Matters, but also in the Supreme Court of Justice, the highest judicial institution in Mexico, and other judicial bodies throughout the country. Regardless of their interpretation of international human rights law, it is a transnational judicial practice that could guide the interpreting methods and judicial practices of both institutions for the utmost protection of human rights and fundamental freedoms.

#### IV. THE RIGHT TO VOTE AS A PRACTICE OF EQUALITY AND NON-DISCRIMINATION, AND PERSPECTIVES FROM FOREIGN LEGAL SYSTEMS

Just as the Constitution establishes the electoral rights of citizens, several other articles tend to guarantee the equality that exists between all individuals within Mexican territory, regardless of origin, gender or social condition. Therefore, the prohibition of discrimination is established within the framework of the Constitution as a starting point for all the individual guarantees or fundamental rights to which every individual in Mexico is entitled. Obviously, the status of national or alien imposes certain limitations, essentially in political-electoral matters, but beyond that—as well as the condition of attaining legal age to obtain Mexican citizenship—the fifth paragraph of Article 1 of the Constitution stipulates the prohibition of all and any type of discrimination that infringes on the rights and freedoms of people, or those which are contrary to human dignity.

Due to the above, the Constitution established and magnifies the concept of legal equality based on the concept of non-discrimination. According to Rubio Llorente, “equality names a relational concept, not the quality of a person, of an object (material or ideal), or of a situation, whose existence can be confirmed or denied as a description of that barely considered reality; it is always a relation that occurs between two persons, objects or situations.”<sup>37</sup> From the interpretation of this assertion, it might be understood that equality refers to equal standing in relationships between two similar subjects; that is, the capacity to sustain an equal relation between subjects with similar characteristics and in identical situations.

The Supreme Court of Justice has adopted certain jurisprudential criteria with an Aristotelian spirit, looking for equality between the relations and legal positions of individuals considered equals, as well as the one between those considered unequal. Nevertheless, these criteria evidently impose distinctions

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<sup>37</sup> FRANCISCO RUBIO LLORENTE, *LA FORMA DEL PODER. ESTUDIOS SOBRE LA CONSTITUCIÓN* 640 (1993).



that are hard to overlook, creating a legal stigma that extends to those considered “unequal”.

Due to the inequality of the political rights of convicted prisoners or those facing criminal proceedings and those of the rest of society as established in the Constitution, convicts are blocked from casting their votes as a direct consequence of the suspension of their electoral rights. Therefore, we perceive it as a wrongful application of the right of freedom that transcends and even transgresses the right to legal equality.<sup>38</sup> The fact that convicted felons are not permitted to vote imposes a form of discrimination against the rest of the population that restricts the exercise of their other fundamental rights.

The purpose of a conviction is to limit the right or liberty of movement<sup>39</sup> of a person found guilty of committing a crime, and not to restrict, either partially or completely, other rights.<sup>40</sup> Since a conviction aims at<sup>41</sup> an individual’s readjustment and further reinsertion into society, the suspension of the right to vote while convicted tends to have a regressive effect on its purpose: it hinders interaction between the convict and the society to which he or she formally belongs. In the opinion of Bajo Fernández, “...the primary function of conviction is to motivate individuals to behave appropriately, inhibiting antisocial tendencies and promoting valuable behavior.”<sup>42</sup> Therefore, electoral decisions are a fundamental right that has no relation whatsoever to freedom of movement, and in consequence, no restriction of this kind should be placed on convicts.<sup>43</sup>

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<sup>38</sup> See JEAN JACQUES ROUSSEAU, DISCOURS SUR L’ORIGINE ET LES FONDEMENTS DE L’INÉGALITÉ PARMIS LES HOMMES 63-4 (2008) (“I conceive two types of inequality in mankind; I call the first one natural or Physical... The other we might call a moral inequality, or political, since it depends on a sort of convention, which is established or at least authorized by Men’s consent. It consists in the different Privileges, some of which some enjoy in spite of others....”).

<sup>39</sup> See Miguel Bajo Fernández, *Reflexiones sobre el sentido de la pena privativa de la libertad*, in JAVIER PIÑA Y PALACIOS, MEMORIA DEL PRIMER CONGRESO MEXICANO DE DERECHO PENAL 111 (1981) (“[T]he conviction implies the suppression of the liberty of a person for a determined amount of time....”).

<sup>40</sup> This concept, known as *residual liberty*, implies that a person’s detention only limits or suspends some elements of his liberty, but there are other rights that to be suspended, require an independent justification. Ziegler, *supra* note 13, at 204. This concept is included in Principle 6 of the UN Basic Principles for the Treatment of Prisoners.

<sup>41</sup> According to the National Consulting Commission of Human Rights of France [CNCDDH], there are four main objectives to convictions: to give everyone what they deserve, to express the extent and reach of the law as a form of social representation, to open the temporary perspective of reparation, and to reestablish social cohesion. Considering this, the right to vote does not fall under any of said conditions since the deprivation of a convict’s freedom of movement already implies the suppression of his most basic right, which is fundamental for the exercise of his other human rights. See 1 CNCDDH, SANCTIONNER DANS LE RESPECT DES DROITS DE L’HOMME: LES DROITS DE L’HOMME DANS LA PRISON 18-20 (2007).

<sup>42</sup> Bajo, *supra* note 39, at 105.

<sup>43</sup> See Ewald, *supra* note 9, at 125-26, 130 (“People convicted of crime, it seems, are far more likely to endorse the laws they’ve broken — to “accept them as desirable guides for life” —

With this in mind, convictions impose a sanction that transgresses civil rights—basically the freedom of movement—while leaving the right to education, to health, to petition, to work and others intact. Nevertheless, the fact that said imprisonment trespasses civil rights to infringe upon political ones implies a discrepancy with the democratic standards the Political Constitution clearly states. William Powers asserts the fact that a convict has been deprived of his liberty does not imply that he shall lose the protection of his other fundamental rights as well.<sup>44</sup>

This situation has been found in two cases recently examined by the European Court of Human Rights (hereinafter ECtHR). The first case, *Hirst v. United Kingdom*,<sup>45</sup> has been transcendental in the European Union as well as in the international framework of human rights law. This petition was filed by John Hirst against the application of electoral rights in his country and its legislation,<sup>46</sup> which rescinds the right to vote and be elected from citizens who have been convicted as part of the judgment passed on them.

After exhausting all legal procedures and losing the appeal Hirst filed a complaint before the ECtHR, so that this supranational legal system could determine the legitimacy of the appeal decision issued by the British courts, as well as concurrence between the application of electoral laws in his country and international human rights standards, specifically Article 3 of Protocol 1 of the Treaty of Rome and the rest of the basic United Nations documents (the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights).

By examining the *Representation of the People Act* and Article 3 of Protocol 1 of the European Convention of Human Rights (hereinafter ECHR),<sup>47</sup> the ECtHR showed that by denying John Hirst his right to participate in general elections held in the country, the United Kingdom contravened and violated his political rights. Therefore, the State had the legal obligation to revise its

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than to join together and lobby for abolition of the criminal code... when citizens convicted of a crime vote, they are doing what all voters do: actively endorsing the political system”).

<sup>44</sup> William Ashby Powers, *Hirst v. United Kingdom (No. 2)*, *A First Look at Prisoner Disenfranchisement by the European Court of Human Rights*, 21 CONN. J. INT'L L. 243, 271 (2006).

<sup>45</sup> A similar complaint had already been brought before the European Court of Human Rights. In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court established that the right to vote is an inherent and fundamental part of the right to free elections, stated both in the European Convention on Human Rights and in other instruments that conform the *corpus juris* of International Human Rights Law. *See id.* at 18.

<sup>46</sup> *Representation of the People Act* of 1983, which clearly established that every convicted felon would have his or her political-electoral rights removed completely, therefore, eliminating their rights to active and passive votes.

<sup>47</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, March 20, 1952, CETS 009 (stating that the Parties will hold free elections by secret ballot that will ensure the free expression and choice of the legislature and popular representatives).

national laws to coincide<sup>48</sup> with international human rights instruments and specifically with Protocol 1, which recognizes the right to participate in democratic elections.<sup>49</sup> The High Court basically challenged the British concept of voting as a privilege and turned it into a legal obligation for all citizens, whether in prison or not.

The second case reviewed by the ECtHR was *Frodl v. Austria*.<sup>50</sup> This case concerned an Austrian citizen, Helmut Frodl, who received a life sentence for murder. Austrian law stated that imprisonment longer than one year forfeits the right to vote. In view of the similarities of this case with that of *Hirst*, it was thought to be more likely to succeed. Although the Austrian government argued that it had not breached its conventional obligations under Article 3 of Protocol 1, the Court pointed out that there were three criteria the State had to fulfill to avoid breaching its international obligations:

1. Disenfranchisement should be directed at a restricted group of offenders, who must be clearly defined.
2. There must be a direct link between the crime and the sanction of disenfranchisement.
3. The conviction must be ordered by judicial decision.

The ECtHR found that in *Frodl v. Austria*, the Austrian government had respected only the first of the three criteria set forth in *Hirst*, but failed to judicially establish a direct link between the crime and disenfranchisement (the jurisprudential principle of “disenfranchisement as an exception, even in the case of convicted prisoners”),<sup>51</sup> by means of a single, reasoned decision that establishes the motives for disenfranchisement. Therefore, the ECtHR ruled that disenfranchisement should be an option only in cases in which democracy itself is in danger, and not as a systematic punishment.

This same idea has been contemplated by Manza, Brooks and Uggen, who point out that removing the right to vote of citizens who have been convicted is a cruel sanction in a democratic society —and even more if it supposedly

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<sup>48</sup> See Powers, *supra* note 44, at 40 (“The Chamber reminded the U.K. Government that it could deprive a prisoner of his or her liberty of movement, and any other right that was necessary to achieve that aim, but that it could not use a prisoner’s status as a *carte blanche* to deprive prisoners of their rights guaranteed under the Convention”).

<sup>49</sup> See ESTELLE FOHRER-DEDEURWAERDER, *L’INCIDENCE DE LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME SUR L’ORDRE PUBLIC INTERNATIONAL FRANÇAIS* 80 (1999) (“The European Convention of Human Rights... might produce a mitigated effect in certain international situations, leaving a margin of appreciation to State Parties (which does not exclude the existence of some legal harmony). Nevertheless... the Convention shall not lose its formal value as a treaty and as an institutional treaty, and more specifically its hierarchic value and the fact that its transgression might give way to an individual claim”).

<sup>50</sup> *Frodl v. Austria*, Eur. Ct. H. R. (2010).

<sup>51</sup> *Id.* at 35 (2010).

purports the standards of universal suffrage. According to them, it might even be comparable to the “civic death” of ancient times, in which citizen rights could be lost in their totality.<sup>52</sup> Cases like *Hirst v. United Kingdom* and *Frodl v. Austria* have begun to appear repeatedly in other democratic regimes, most notably the United States of America, Canada and France.

In the United States, this situation has had a growing impact on the population.<sup>53</sup> As a result, the U.S. Congress has decided to start amending the law—the *Democracy Restoration Act*—to allow ex-convicts to vote in the country’s general elections. Notwithstanding the above, one of the most important precedents on the subject was the judgment issued at *Richardson v. Ramirez trial*,<sup>54</sup> in which the Court determined that the only constitutional exception for denying an individual his right to vote was that he had been previously convicted, despite Justice Thurgood Marshall’s dissident opinion stating that the idea behind said resolution ran contrary to the spirit of America’s government system, its democratic ideals.<sup>55</sup>

Nowadays, the U.S. election model can be compared to the Mexican one since some U.S. states allow ex-convicts to vote after their release from prison, but not those who are still convicted.<sup>56</sup> The general tendency, however, is that the right to vote must be considered an inalienable political right, regardless of the person’s social situation, and most notably, their criminal situation. As expressed by the U.S. Supreme Court of Justice in their ruling on *Wesberry v. Sanders* in 1964,<sup>57</sup> “there is not one right that is most appreciated in a free country as the right to have a voice in the election of those who make laws under which, as good citizens, we must live. Other rights, including the most elementary ones, are illusive if the right to vote is transgressed.”<sup>58</sup> Or, as the Warren Court said in *Reynolds v. Sims*: “the right to vote freely is the essence of a democratic society, and any restrictions are contrary to the notion of representative government. Voting is a fundamental right.”<sup>59</sup>

Even some U.S. scholars, such as Reuven Ziegler, mention that:

Due to its unique constitutional stipulations, as well as to its general reluctance to engage foreign legal sources, U.S. jurisprudence appears to be lagging behind an emerging global jurisprudential trend which increasingly views dis-

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<sup>52</sup> See Jeff Manza et al., *Public Attitudes Towards Felon Disenfranchisement in the United States*, 68 PUB. OP. Q. 275, 283 (2004).

<sup>53</sup> See *id.* at 276 (“Because virtually all incarcerated felons, and many non-incarcerated felons as well, are barred from voting, the size of the disenfranchised population has grown in tandem with the general expansion of the criminal justice system”).

<sup>54</sup> *Richardson v. Ramirez*, 418 U.S. 24 (1974).

<sup>55</sup> Powers, *supra* note 44, at 30-1.

<sup>56</sup> The only two American states that allow convicts and ex-convicts to vote normally are Vermont and Maine, while the rest have different degrees of disenfranchisement.

<sup>57</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>58</sup> *See id.*

<sup>59</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

enfranchisement as a suspect practice, and subjects it to ever-stricter judicial review. The discourse follows a 'residual liberty' approach according to which convicts remain rights-holders, views universal suffrage as the democratic ideal, and rejects regulatory justifications for disenfranchisement.<sup>60</sup>

U.S. legal doctrine and practices consider the deprivation of the right to vote an anachronistic practice, a clear reflection of the Jim Crow era that tried to disguise the right to equality and non-discrimination through laws that incited racial segregation by prohibiting certain minorities from participating in democracy, directly transgressing the right to equality.<sup>61</sup> Therefore, in an era that extols human rights and international *pro homine* tendencies toward all situations that might put the rights of an individual at risk, the persistence of said legal stigmas is largely unthinkable and absolutely unjustifiable.

Canada has also dealt with this type of situations, most notably in *Sauvé v. Canada*.<sup>62</sup> The debate on this case centered on the existence of a norm in the *Canada Elections Act* that established a ban on the right to vote of every convict who had been sentenced to a term longer than two years, which did not coincide with the provisions of the 1982 *Charter of Rights and Freedoms of Canada*.<sup>63</sup> Due to the fact that this constitutional text did not contain any reference regarding the possibility of denying a person his right to vote or restrict it because of social differences, the Supreme Court of Canada had to determine justification for government infringement of this fundamental norm, through the double criteria of the legitimacy of the objective and the proportionality of the means.

In sum, after examining the totality of the elements of the case, the Canadian Supreme Court sought a "rational connection between governmental aims of enhancing 'civic responsibility and the respect for the rule of law, and [providing] additional punishment' and the government's action of disenfranchising prisoners. The *Sauvé* court found neither of these objectives to be rationally connected to an infringement on the right to vote."<sup>64</sup>

In that resolution, the Court determined that "denial of the right to vote to penitentiary inmates undermines the legitimacy of government, and the rule of law. It curtails the personal rights of the citizen to political expression and participation in the political life of his or her country. It countermands the message that everyone is equally worthy and entitled to respect under the

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<sup>60</sup> Ziegler, *supra* note 13, at 201.

<sup>61</sup> American Civil Liberties Union, *Democracy Restoration Act Needed to Restore Voting Rights of Millions of Americans*, July 14, 2009, <http://www.aclu.org/racial-justice-voting-rights/democracy-restoration-act-needed-restore-voting-rights-millions-america> (last visited February 2, 2012).

<sup>62</sup> *Sauvé v. Canada*, [2002] 3 S.C.R. 519.

<sup>63</sup> Part I of the Constitution Act, 1982, art. 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

<sup>64</sup> Powers, *supra* note 44, at 32.

law — that everybody counts.”<sup>65</sup> The Canadian court was of the opinion that a plausible object like temporary disenfranchisement forming part of a convict’s punishment may not be reached by disproportionate measures. Denying a convict the right to vote transcends the circle of a citizen’s fundamental rights since it affects the right to universal suffrage irrationally and disproportionately, and even more so if one considers the other rights restricted by being in prison.<sup>66</sup>

Canadian doctrine has also tended to consider disenfranchisement excessive punishment that essentially affects the rest of a convict’s fundamental rights. Therefore, refusing participation in national elections because a person is in prison is a segregating and unequal punishment that transgresses the highest international standards of human rights. “Imprisonment may take away a prisoner’s freedom, but it does not nullify a prisoner’s right to equal treatment under the law, and it must never be allowed to sever the ties that link a prisoner to the brotherhood and sisterhood the Universal Declaration of Human Rights accords us all.”<sup>67</sup>

In Europe, the French Republic is another example in which the right to vote and the restriction of liberty are compatible. To begin with, Article 3 of the 1958 Constitution of the Fifth Republic clearly establishes electors — under legally determined conditions — as all French nationals over the age of 18 who exercise their civil and political rights, as well as the fact that suffrage is universal, equal and secret. It does not mention any restriction whatsoever regarding the exercise of the freedom of movement as a requirement for exercising the right to vote.

Notwithstanding the above, in apparent contradiction to the Constitution, a law was passed to automatically suspend convicts’ right to vote, regardless of the stipulation of equality in the right to suffrage set forth in Article 3 of the French Constitution. This situation was modified in 1994 through a reform that led to an explicit compatibility between the text of the French Constitution and its secondary laws. Today, there are government campaigns to promote voting among the prison population.<sup>68</sup>

In fact, Article 6 of the Electoral Code of France (Code Électoral) establishes that the only restrictions on the right to vote may take effect place when a court has determined that for a specific period of time the right to vote and to be elected is suspended. This legislative provision shall be understood in

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<sup>65</sup> *Id.* at 33-4.

<sup>66</sup> See generally JIM YOUNG, SAUVÉ V. CANADA (1983) – VOTING RIGHTS FOR PRISONERS (2010).

<sup>67</sup> MICHAEL JACKSON, JUSTICE BEHIND THE WALLS: HUMAN RIGHTS IN CANADIAN PRISONS 617 (2002).

<sup>68</sup> “Due to the fact that a great majority of convicts benefit of the right to vote, the penitentiary administration is looking forward to transform voting in prison into a numerical reality, since it has been recognized as a right since the law of 1994 that modified the Criminal Code.” Ministère de la Justice et des Libertés, *Vote en prison: l’administration pénitentiaire se mobilise*, May 11, 2007, <http://www.justice.gouv.fr/actualite-du-ministere-10030/vote-en-prison-ladministration-penitentiaire-se-mobilise-12561.html>.

accordance with Article 131-26 of the Criminal Code of France, which sets forth that civic rights are to be suspended by express judicial decision.

In France, the right to vote constitutes an attribute of citizenship and has been enhanced as such by the Constitutional Council... The CNCDH (National Consultative Commission on Human Rights) considers that all that favors the effectiveness of the right to vote within convicted population in penitentiary centers contributes to reinforce the interest of said population for the exercise of their citizenship, as well as the candidates' interest for penitentiary matters.<sup>69</sup>

Thus, the standpoint of the French Government on the right to vote as a human right has been expressed in Recommendation 24 of the CNCDH: "Each one of these measures constitute a phase to social reintegration, at least symbolically."<sup>70</sup> Hence, pursuing the main objective of imprisonment, the regeneration of individuals so they can later be reinserted into society, contributes to developing a sense of belonging and attention within the convicted population that far from affecting a country's democracy, reinforces it. As Ewald points out, "...retaining the right to vote would in fact involve [citizens convicted of crime] in a symbolic reaffirmation of the status quo."<sup>71</sup>

In the Mexican Constitution, however, there is no provision establishing that serving a sentence implies the prisoner's loss of citizenship, but only a temporary suspension of his political rights. Nevertheless, this measure does attack human dignity, for it vilifies it and diminishes a person's social situation, political capacity and democratic participation, engendering a situation of inequality that has no relation whatsoever with national origins or legal age, thus jeopardizing a person's right to equality and the exercise of political rights —specifically the right to vote.<sup>72</sup>

What is more remarkable about this statement is the social reduction that prisoners suffer. Although it is true that their situation generates a stigma and negative social perception, it is also true that contrary to the provisions in the Constitution, disenfranchisement implies discrimination regarding their social condition.<sup>73</sup> Consequently, by restricting the right to emit their universal suffrage, social exclusion ensues, transgressing the right to equality and non-discrimination purported by fundamental law and international human rights instruments.<sup>74</sup>

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<sup>69</sup> LDH Toulon, *Le vote : droit ou privilège ?*, Nov. 2, 2006, <http://www.ldh-toulon.net/spip.php?article1594> (last visited February 2, 2012).

<sup>70</sup> CNCDH, *supra* note 41, at 62.

<sup>71</sup> Ewald, *supra* note 9, at 131.

<sup>72</sup> See Becerra, *supra* note 2, at 181 ("[T]he respect of human rights is a *sine qua non* condition of the rule of Law, as well as to create a democratic system").

<sup>73</sup> See Ziegler, *supra* note 13, at 265 ("Disenfranchisement fails to treat convicts as politically equal [albeit recalcitrant] community members, and it adversely affects them both as individuals and as members of social groups").

<sup>74</sup> See Powers, *supra* note 44, at 52-3 ("As opposed to the traditional view of voting as a privi-

Considering some studies on Latin American doctrine regarding the primacy and hierarchy of fundamental rights, as well as some general principles of Law, we can say that the constitutional norm that provides for the suspension of the right to vote might well have been derogated. Article 38 of the Political Constitution of the United Mexican States, which establishes the suspension of the rights and prerogatives of Mexican citizens—including the right to vote—is one of the few constitutional articles that has not been reformed since its enactment on February 5, 1917.

Considering that general principles of law in the Mexican legal framework have a special relevance regarding the application of the law, as provided by Article 19 of the Federal Civil Code, which establishes that said principles shall be used to solve judicial controversies that arise due to the absence of a legal provision regulating a specific situation, the application of the Latin principle of *lex posterior derogat priori* would be an interesting argument that could be used as a legal tool to invalidate the provisions of Article 38, and replace them for the more recent promulgation (August 14, 2001) of the paragraph 3 of Article 1 of the Constitution, which states the principle of non-discrimination.

Mexican jurist and scholar Miguel Carbonell states that:

For this matter, the criterion that shall be applied is that of the posterior law... According to it, the most recent norm derogates older norms. By virtue of this, we might argue that the third paragraph of the first constitutional article derogated [fractions second and third] of Article [38] of the Constitution. Therefore, [such disposition]... is contrary to Article 1 and shall be declared unconstitutional by the corresponding legal bodies.<sup>75</sup>

The Mexican Supreme Court of Justice's declaration of unconstitutionality of a provision that is part of the Constitution would imply that as of that moment, Article 1 of the Constitution would have primacy over Article 38, which would in turn be invalidated and stripped of its legal force. This would also imply that the suspension of the right to vote would no longer have its origins in the Constitution and by becoming federal law—secondary, if included in the Federal Code of Electoral Institutions and Procedures (COFIPE), its effects would be in accordance with the constitutional and international provisions in force for electoral matters. The right to vote would then become a fundamental right that could not be transgressed against any person.

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lege for select members of society, the European Court of Human Rights has moved closer to recognizing the right to vote as fundamental to all citizens... as part of the foundation of a free and democratic society").

<sup>75</sup> MIGUEL CARBONELL, IGUALDAD Y LIBERTAD. PROPUESTAS DE RENOVACIÓN CONSTITUCIONAL 99 (2007).



V. THE NEED TO ADAPT THE MEXICAN LEGAL SYSTEM TO INTERNATIONAL STANDARDS ON THE RIGHT TO VOTE

As largely discussed in international law doctrine, after the codification of customary law on treaties in the Vienna Convention on the Law of Treaties, States cannot escape their international commitments by excusing themselves for contradictions with their national legal orders.<sup>76</sup>

What is even more remarkable is the fact that Mexico has officially presented several reservations on the human rights treaties it has ratified, but none concerning Article 38 of the Constitution, which limits the right to universal suffrage. Therefore, the provisions contained in the 1966 International Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights and other similar international instruments are legally binding for the Mexican State, which is then obligated to adopt any internal measures deemed necessary to guarantee the effectiveness and fulfillment of said provisions.

By virtue of this, it is important to examine the obligations derived from two articles of the American Convention on Human Rights, namely Articles 23 (on political rights) and 27.2 (on the rights/guarantees that are not subject to suspension). On these matters, Miguel Carbonell explains that “We must recall that the American Convention on Human Rights, in its Article 27.2, does not consider suspension for the rights set forth in Article... 23 (political rights)...”<sup>77</sup> Even though the suspension of guarantees might only occur in extreme situations, whether caused by men or acts of God, if these situations never specifically arise, it becomes impossible to suspend people’s political rights, and the right to vote even more so. This same line of thought is set forth in fraction b of Article 25 of the International Covenant on Civil and Political Rights, which states that such rights are immovable for all people and shall be guaranteed without any unreasonable restriction.

The ideology of the Mexican government apparently continues to stand contrary to the current trends in International Human Rights Law on this matter. Although it is included in all transcendent international human right documents, voting is not yet considered a fundamental right within national legal framework. This situation deviates from international law and could therefore be subjected to in-depth modifications. “...[T]he right to vote must be considered a fundamental right as long as the legal framework has it set forth in a constitutional norm or another norm of like hierarchy, and as long as it is recognized that such right comprehends universal human rights as well, at least partially...”<sup>78</sup>

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<sup>76</sup> See THOMAS BUERGENTHAL ET AL., *LA PROTECCIÓN DE LOS DERECHOS HUMANOS EN LAS AMÉRICAS* 485 (1990) (“In human rights... we must just take a look at the great number of treaties in force that have been ratified by many States; what we need is compliance. [This] makes the tasks of International Human Rights Law so much more difficult”).

<sup>77</sup> CARBONELL, *supra* note 75, at 44.

<sup>78</sup> Arenas, *supra* note 14, at 64.

We must mention that the position of the government is not just contrary to international treaties on the subject (hard law), but also to international jurisprudence that has begun to appear in Europe and in some democracies in the Americas. As a source of public international law based on the Statute of the International Court of Justice and conforming with the provisions of Article 11 of the *Ley sobre la Celebración de Tratados* [Law on the Adoption of Treaties], international jurisprudence stemming from the different human rights organisms, including the ECtHR and the Inter-American Court of Human Rights, shall be effective and recognized by the Mexican State.

Therefore, "...[I]n matters related to human rights, the national judge is obliged to apply international law [within the national legal order] with his sentences [and to] decide basing on international law, that is, [interpreting in accordance with] the international framework of human rights."<sup>79</sup> Consequently, considering the aforementioned case law (*Hirst v. United Kingdom, Frodl v. Austria, Mathieu-Mohin and Clerfayt v. Belgium*, and *Sauvé v. Canada*, among others), the Mexican State would be obliged to implement such criteria within its national legal system, to ensure its compatibility with the international sphere of human rights protection and thus comply with all its international obligations —including that of guaranteeing convicts' right to vote.

For this reason, adapting the Mexican legal system —on both constitutional and legislative levels— must take place to assert the government's official position on human rights. There are outstanding challenges that Mexico will face, as well as several options that will be explored in depth to modernize the humanist perspective of the nation, and eventually reach the levels of efficiency of human rights systems found in other democracies.

The true adoption of a humanist stance at all levels of government is one of the main objectives that Mexico must consider when facing these challenges. As Manuel Becerra says, "the *pro homine* principle... implies the flexible application of human rights norms in favor of individuals and [strengthens] the trend stating that human rights, in both its substantive and adjective aspects, are a fundamental part of international public order..."<sup>80</sup> On these grounds, Mexico must comply with this international public order —specifically with treaties that do not create reciprocal obligations, but actions or abstentions that favor the development of human beings, in order to ensure consistence growth.

If establishing the right to vote as a truly universal and inalienable right is its main objective, the State could begin adapting to the necessary requirements so as to attain full adhesion to political human rights standards by taking into consideration an interesting legal instrument: the *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the United Nations Economic and Social Council (ECOSOC) in 1955 as a non-binding instrument that compiles a series of principles to improve penitentiary administration.

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<sup>79</sup> BECERRA, *supra* note 17, at 61.

<sup>80</sup> *Id.* at 60.

These rules set several parameters that must be considered to improve and maximize the efficiency of convicts' living conditions to avoid imposing excessive punishment and to aid in achieving its ultimate goal: social rehabilitation. Notwithstanding, depriving convicts of the right to vote seems to go directly contrary to this ideology, as well as the entire system of civil and political rights. As Jackson says:

...[T]hree fundamental human rights principles emerge from the ninety-five individual articles of the *Standard Minimum Rules*. First, a prisoner's dignity and worth as a human being must be respected through the entire course of his or her imprisonment. Second, the loss of liberty through the fact of incarceration is punishment enough. Third, prisons should not be punishing places; rather, they should help prisoners rehabilitate themselves.<sup>81</sup>

Mexico has participated in drafting these penitentiary principles, and has later adopted and ratified the instrument to be used as a standard to be complied with in national territory. Nevertheless, its effectiveness is dubious and its mandatory status is null; ergo, Mexico has not taken any steps to fulfill these international principles. It should also be pointed out that this set of rules does not establish any regulations on the right to vote. However, it does mention that the appropriate measures must be taken to continue with the convict's social development. This development must include civic awareness and an education in democracy, and therefore, the right to vote must be considered a basic standard to achieve this integration.<sup>82</sup>

The right to vote is considered an important prerogative by some humanist and democratic regimes, as it is part of the fundamental rights inherent to individuals. It is also a parameter with which to measure true democratic development —and therefore the development and effectiveness of human rights— within a given country. The application of the penitentiary principles set forth in the *Standard Minimum Rules for the Treatment of Prisoners*, which Mexico has voluntarily ratified,<sup>83</sup> as well as the adoption of ECtHR jurisprudential criteria either directly or through normative harmonization,<sup>84</sup> are two basic actions the State could and should apply to improve its penitentiary

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<sup>81</sup> Jackson, *supra* note 67, at 613.

<sup>82</sup> Arenas, *supra* note 14, at 65 (“[I]n the future, the theory of vote-individual right should prevail while interpreting suffrage [according to which] the right to vote shall be construed as being inherent to men and morally inalienable...”).

<sup>83</sup> In the sense given by the Vienna Convention on the Law of Treaties of 1969, any international treaty that is concluded, independently from the denomination it is given, will be compulsory for the contracting Parties.

<sup>84</sup> See Juan José Gómez Camacho, *Presentation to SECRETARÍA DE RELACIONES EXTERIORES & DELEGACIÓN DE LA COMISIÓN EUROPEA EN MÉXICO, MEMORIAS DEL SEMINARIO LA ARMONIZACIÓN DE LOS TRATADOS INTERNACIONALES 12 (2005)* (“Normative harmonization is to combine federal or state provisions with those of international human rights treaties that are pretended to be incorporated or that have already been incorporated to the national legal order, aiming, first,

system, to allow convicts the right to vote, to increase its level of democracy, and to eradicate one form of discrimination that has no place in Mexico's current legal and humanist situation.<sup>85</sup>

By considering itself a nation in which the respect to human rights and democratic values is fundamental, undeniable and under constant development, Mexico has no option but to start working on the legal and constitutional reforms needed to ensure that the country's international image concurs with its reality. As William Powers says, "the right of citizens to vote for members of their government is fundamental in any democratic society... [Nevertheless,] the extent to which all citizens of a country participate in the democratic process, even those on the fringes of society, gives a stronger indication of the degree to which a country truly values its democratic system."<sup>86</sup>

Mexico is not the only country in which denying convicts the right to vote is the norm. However, it is important for our democratic regime to adapt to the international movement towards human rights so it may avoid perpetuating an anachronistic stance that is harmful to both civil society and the plural and representative democracy that characterizes Mexico.<sup>87</sup> As Manza says, "...conflicts over felon disenfranchisement reflect an enduring tension in the 20<sup>th</sup> century...political life: the clash between the desire to maintain social and political order versus the desire to extend civil rights and liberties to all citizens."<sup>88</sup> It is therefore necessary for Mexico to move towards the 21<sup>st</sup> century; this is, towards a humanist, inclusive and guarantor position regarding the international human rights to which every person is entitled.

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to avoid normative conflicts, and second, to give efficacy to international instruments at the national level").

<sup>85</sup> See Ziegler, *supra* note 13, at 211-12 ("[There is] a shared vision of a democratic paradigm, coupled with a perception of convicts as rights-holders who are *ab initio* entitled to vote and whose disenfranchisement thus needs to be independently justified").

<sup>86</sup> Powers, *supra* note 44, at 1.

<sup>87</sup> See José Miguel Vivanco, *Experiencias positivas y obstáculos para armonizar la legislación de derechos humanos en América Latina*, in SECRETARÍA DE RELACIONES EXTERIORES & DELEGACIÓN DE LA COMISIÓN EUROPEA EN MÉXICO, *supra* note 85, at 32 ("We must understand that these two legal values: citizen security and respect for fundamental rights are perfectly complementary to each other and they shall develop in that sense").

<sup>88</sup> Manza et al., *supra* note 52, at 276.

Recibido: 28 de febrero de 2011.

Aceptado para su publicación: 24 de junio de 2011.